SIDEBAR

Group Gives Up Death Penalty Work

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Last fall, the American Law Institute, which created the intellectual framework for the modern capital justice system almost 50 years ago, pronounced its project a failure and walked away from it.

There were other important death penalty developments last year: the number of death sentences continued to fall, Ohio switched to a single chemical for lethal injections and New Mexico repealed its death penalty entirely. But not one of them was as significant as the institute's move, which represents a tectonic shift in legal theory.

"The A.L.I. is important on a lot of topics," said Franklin E. Zimring, a law professor at the University of California, Berkeley. "They were absolutely singular on this topic" — capital punishment — "because they were the only intellectually respectable support for the death penalty system in the United States."

The institute is made up of about 4,000 judges, lawyers and law professors. It synthesizes and shapes the law in restatements and model codes that provide structure and coherence in a federal legal system that might otherwise consist of 50 different approaches to everything.

In 1962, as part of the Model Penal Code, the institute created the modern framework for the death penalty, one the Supreme Court largely adopted when it reinstituted capital punishment in Gregg v. Georgia in 1976. Several justices cited the standards the institute had developed as a model to be emulated by the states.

The institute's recent decision to abandon the field was a compromise. Some members had asked the institute to take a stand against the death penalty as such. That effort failed.

Instead, the institute voted in October to disavow the structure it had created "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."

That last sentence contains some pretty dense lawyer talk, but it can be untangled. What the institute was saying is that the capital justice system in the United States is irretrievably broken.

A study commissioned by the institute said that decades of experience had proved that the system could not reconcile the twin goals of individualized decisions about who should be executed and systemic fairness. It added that capital punishment was plagued by racial disparities; was enormously expensive even as many defense lawyers were underpaid and some were incompetent; risked executing innocent people; and was undermined by the politics that come with judicial elections.

Roger S. Clark, who teaches at the Rutgers School of Law in Camden, N.J., and was one of the leaders of the movement to have the institute condemn the death penalty outright, said he was satisfied with the compromise. "Capital punishment is going to be around for a while," Professor Clark said. "What this does is pull the plug on the whole intellectual underpinnings for it."

The framework the institute developed in 1962 was an effort to make the death penalty less arbitrary. It proposed limiting capital crimes to murder and narrowing the categories of people eligible for the punishment. Most important, it gave juries a framework to decide whom to put to death, asking them to balance aggravating factors against mitigating ones.

The move to combat arbitrariness without giving up sensitivity to individual circumstances is known as "guided discretion," which sounds good until you notice that it is a phrase at war with itself.

The Supreme Court's capital justice jurisprudence since 1976 has only complicated things. Justice Harry A. Blackmun conceded in 1987 that "there perhaps is an inherent tension between the discretion accorded capital sentencing juries and the guidance for use of that discretion that is constitutionally required."

That was an understatement, Justice Antonin Scalia said in 1990. "To acknowledge that 'there perhaps is an inherent tension,' " he wrote, "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis powers in World War II."

Justice Scalia solved the problem by vowing never to throw out a death sentence on the ground that the sentencer's discretion had been unconstitutionally restricted.

In 1994, Justice Blackmun came around to the view that "guided discretion" amounted to "irreconcilable constitutional commands." But he drew a different conclusion than Justice Scalia had from the same premise, saying that "the death penalty cannot be administered in accord with our Constitution." He said he would no longer "tinker with the machinery of death." The institute came to essentially the same conclusion.

Some supporters of the death penalty said they welcomed the institute's move. Capital sentencing "is so micromanaged by Supreme Court precedents that a model statute really serves very little function," Kent Scheidegger of the Criminal Justice Legal Foundation wrote in a blog posting. "We are perfectly O.K. with dumping it."

Mr. Scheidegger expressed satisfaction that an effort to have the institute come out against the death penalty as such was defeated.

But opponents of the death penalty said the institute's move represented a turning point.

"It's very bad news for the continued legitimacy of the death penalty," Professor Zimring said. "But it's the kind of bad news that has many more implications for the long term than for next week or the next term of the Supreme Court."

Samuel Gross, a law professor at the University of Michigan, said he recalled reading Model Penal Code as a first-year law student in 1970. "The death penalty was an abstract issue of little interest to me or my fellow students," Professor Gross said. But he remembered being impressed by the institute's work, saying, "I thought in passing that smarter people than I had done a sensible job of figuring out this tricky problem."

Things will look different come September, Professor Gross said.

"Law students who take first-year criminal law from 2010 on," he said, "will learn that this same group of smart lawyers and judges — the ones whose work they read every day — has said that the death penalty in the United States is a moral and practical failure."